

Mar 11, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CARRIE W.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:18-CV-3126-LRS

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT,
*INTER ALIA***

BEFORE THE COURT are the Plaintiff's Motion For Summary Judgment (ECF No. 14) and the Defendant's Motion For Summary Judgment (ECF No. 15).

JURISDICTION

Carrie W., Plaintiff, applied for Title II Social Security Disability Insurance benefits (SSDI) on July 26, 2011. The application was denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on November 6, 2013, before Administrative Law Judge (ALJ) M.J. Adams. On January 21, 2014, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ's decision and Plaintiff sought judicial review. On June 13, 2016, U.S. Magistrate Judge John T. Rodgers in 1:15-CV-3134-JTR granted a stipulated motion to remand for further administrative proceedings (ECF No. 27).

A new administrative hearing was held on October 4, 2017. Plaintiff testified

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 1**

1 at this hearing, as did Vocational Expert (VE) Beckie Hill. On May 11, 2018, ALJ
2 Adams issued a decision finding the Plaintiff not disabled. The Appeals Council
3 denied a request for review of the ALJ's decision, making that decision the
4 Commissioner's final decision subject to judicial review. The Commissioner's final
5 decision is appealable to district court pursuant to 42 U.S.C. §405(g).

6 7 **STATEMENT OF FACTS**

8 The facts have been presented in the administrative transcript, the ALJ's
9 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here.
10 Plaintiff alleges disability beginning September 9, 2010, on which date she was 43
11 years old, and ending August 2, 2014, on which date she was 47 years old.
12 Plaintiff's date last insured for Title II SSDI benefits is December 31, 2017. Plaintiff
13 has past relevant work experience as a gambling dealer and dealer manager.

14 15 **STANDARD OF REVIEW**

16 "The [Commissioner's] determination that a claimant is not disabled will be
17 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*
18 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere
19 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less
20 than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
21 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.
22 1988). "It means such relevant evidence as a reasonable mind might accept as
23 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91
24 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may
25 reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457
26 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
27 On review, the court considers the record as a whole, not just the evidence supporting
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 2**

1 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
2 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

3 It is the role of the trier of fact, not this court to resolve conflicts in evidence.
4 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
5 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749
6 F.2d 577, 579 (9th Cir. 1984).

7 A decision supported by substantial evidence will still be set aside if the proper
8 legal standards were not applied in weighing the evidence and making the decision.
9 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
10 1987).

11 12 ISSUES

13 Plaintiff argues: 1) the ALJ erred in failing to find Plaintiff has severe
14 medically determinable fibromyalgia and mental health impairments; 2) the ALJ
15 failed to offer specific, clear and convincing reasons for discounting Plaintiff's
16 testimony regarding her symptom and limitations; and 3) the ALJ improperly weighed
17 the medical evidence.

18 19 DISCUSSION

20 SEQUENTIAL EVALUATION PROCESS

21 The Social Security Act defines "disability" as the "inability to engage in any
22 substantial gainful activity by reason of any medically determinable physical or
23 mental impairment which can be expected to result in death or which has lasted or can
24 be expected to last for a continuous period of not less than twelve months." 42
25 U.S.C. § 423(d)(1)(A). The Act also provides that a claimant shall be determined to
26 be under a disability only if her impairments are of such severity that the claimant is
27 not only unable to do her previous work but cannot, considering her age, education
28

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT- 3

1 and work experiences, engage in any other substantial gainful work which exists in
2 the national economy. *Id.*

3 The Commissioner has established a five-step sequential evaluation process for
4 determining whether a person is disabled. 20 C.F.R. § 404.1520; *Bowen v. Yuckert*,
5 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines if she is engaged
6 in substantial gainful activities. If she is, benefits are denied. 20 C.F.R. §
7 404.1520(a)(4)(i). If she is not, the decision-maker proceeds to step two, which
8 determines whether the claimant has a medically severe impairment or combination
9 of impairments. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant does not have a
10 severe impairment or combination of impairments, the disability claim is denied. If
11 the impairment is severe, the evaluation proceeds to the third step, which compares
12 the claimant's impairment with a number of listed impairments acknowledged by the
13 Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R.
14 § 404.1520(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
15 equals one of the listed impairments, the claimant is conclusively presumed to be
16 disabled. If the impairment is not one conclusively presumed to be disabling, the
17 evaluation proceeds to the fourth step which determines whether the impairment
18 prevents the claimant from performing work she has performed in the past. If the
19 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §
20 404.1520(a)(4)(iv). If the claimant cannot perform this work, the fifth and final step
21 in the process determines whether she is able to perform other work in the national
22 economy in view of her age, education and work experience. 20 C.F.R. §
23 404.1520(a)(4)(v).

24 The initial burden of proof rests upon the claimant to establish a prima facie
25 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
26 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
27 mental impairment prevents her from engaging in her previous occupation. The
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 4**

1 burden then shifts to the Commissioner to show (1) that the claimant can perform
2 other substantial gainful activity and (2) that a "significant number of jobs exist in the
3 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
4 1498 (9th Cir. 1984).

5 6 **ALJ'S FINDINGS**

7 The ALJ found the following: 1) during the alleged closed period of disability,
8 Plaintiff had "severe" medical impairments, those being spinal impairment, thyroid
9 disorder, hypertension and obesity; 2) Plaintiff's impairments did not meet or equal
10 any of the impairments listed in 20 C.F.R. § 404 Subpart P, App. 1; 3) Plaintiff had
11 the residual functional capacity (RFC) to perform light work as defined in 20 C.F.R.
12 § 404.1567(b), except she needed to avoid concentrated exposure to extreme cold and
13 hazards such as working around dangerous moving machinery or unprotected heights;
14 4) Plaintiff was capable of performing her past relevant work and alternatively, there
15 were other jobs existing in significant numbers in the national economy which the
16 Plaintiff was capable of performing, including fast food worker, cashier II, and
17 conveyor line bakery worker. Accordingly, the ALJ concluded the Plaintiff was not
18 disabled during the alleged closed period of disability.

19 20 **SEVERE IMPAIRMENTS**

21 A "severe" impairment is one which significantly limits physical or mental
22 ability to do basic work-related activities. 20 C.F.R. § 404.1520(c). It must result
23 from anatomical, physiological, or psychological abnormalities which can be shown
24 by medically acceptable clinical and laboratory diagnostic techniques. It must be
25 established by medical evidence consisting of signs, symptoms, and laboratory
26 findings, not just the claimant's statement of symptoms. 20 C.F.R. § 404.1508.

27 Step two is a *de minimis* inquiry designed to weed out non-meritorious claims
28

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT- 5

1 at an early stage in the sequential evaluation process. *Smolen v. Chater*, 80 F.3d
2 1273, 1290 (9th Cir. 1996), citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)
3 ("[S]tep two inquiry is a *de minimis* screening device to dispose of groundless
4 claims"). "[O]nly those claimants with slight abnormalities that do not significantly
5 limit any basic work activity can be denied benefits" at step two. *Bowen*, 482 U.S.
6 at 158 (concurring opinion). "Basic work activities" are the abilities and aptitudes to
7 do most jobs, including: 1) physical functions such as walking, standing, sitting,
8 lifting, pushing, pulling, reaching, carrying, or handling; 2) capacities for seeing,
9 hearing, and speaking; 3) understanding, carrying out, and remembering simple
10 instructions; 4) use of judgment; 5) responding appropriately to supervision, co-
11 workers and usual work situations; and 6) dealing with changes in a routine work
12 setting. 20 C.F.R. § 404.1521(b).

13 The Commissioner has stated that "[i]f an adjudicator is unable to determine
14 clearly the effect of an impairment or combination of impairments on the individual's
15 ability to do basic work activities, the sequential evaluation should not end with the
16 not severe evaluation step." *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005),
17 citing S.S.R. No. 85-28 (1985). An ALJ may find that a claimant lacks a medically
18 severe impairment or combination of impairments only when his conclusion is
19 "clearly established by medical evidence." *Id.*

20 21 **A. Fibromyalgia**

22 While the ALJ found Plaintiff had mental health impairments which were
23 medically determinable, although not severe, the ALJ found Plaintiff did not suffer
24 from medically determinable fibromyalgia. According to the ALJ:

25 In March 2012, [Plaintiff] told her pain clinic that she had
26 now been diagnosed with fibromyalgia. No such diagnosis
27 exists in the evidentiary record, which does not contain
28 any adequate documentation of positive fibromyalgia
points or any consultation by a rheumatologist. In

1 July 2012, the claimant was nonetheless prescribed
2 Lyrica for fibromyalgia. She denied having pain during
3 medical care in May 2013. An examination in April [2014]
4 noted fibromyalgia tender points, but did not quantify
5 these points or otherwise confirmed that they [were]
6 positive in all four quadrants of the claimant's body.
7 Furthermore, the claimant had no other reports of
8 concurrent symptoms at this time that would amount
9 to a diagnosis of fibromyalgia as required under the
10 diagnostic criteria established by the American College
11 of Rheumatology in 1990 or 2010. Notably, the claimant
12 was gainfully employed for several years after the
13 alleged onset of fibromyalgia in 2007, including after
14 her alleged period [of] disability between September 2010
15 and August 2014. Her work with a casino appears to have
16 ended in mid-2010 and again in September 2016 for
17 reasons unrelated to her physical functioning.

18 (AR at pp. 603-04).¹

19 Plaintiff was seen by Vern D. Commet, ARNP (Advanced Registered Practice
20 Nurse), at Water's Edge Pain Clinic in February 2012, at the request of Plaintiff's
21 treating provider, Rex Quaempts, M.D.. Plaintiff told Commet she had been told she
22 may have fibromyalgia. He noted she was currently taking no medication for
23 treatment of fibromyalgia. (AR at p. 476). On examination, Commet observed the
24 following:

25 Palpation of the sacrum is exquisitely painful bilaterally.
26 She has tenderness as well with palpation of the trochanteric
27 bursa bilaterally. She has palpatory tenderness of the medial
28 fat pads of the knee bilaterally. She has positive palpation
of the sternomastoid muscle anteriorly bilaterally, the
suboccipitals bilaterally, the mid upper trapezius bilaterally,
and the origin of the supraspinatus bilaterally.

29 (AR at p. 477).

30 This appears to show at least 11 positive tender points on each side of the body,
31 both above and below the waist, which is one of the three 1990 American College of
32 Rheumatology (ACR) criteria set forth in Social Security Ruling (SSR) 12-2p for
33 determining whether fibromyalgia is a medically determinable impairment.

34 ¹ Citations omitted.

1 Therefore, it is insignificant that Plaintiff's April 2014 musculoskeletal examination
2 at the pain clinic merely noted the fibromyalgia tender points without quantifying
3 them or confirming they were positive in all four quadrants of the body. (AR at p.
4 1136). While Commet did not specifically diagnose fibromyalgia in conjunction
5 with his February 2012 examination, he effectively accepted it as a diagnosis, noting
6 Plaintiff might "benefit from neuroleptics from a chronic pain standpoint and
7 fibromyalgia," that he would recommend a rheumatologic workup, and that she might
8 do better on Lyrica, a drug often prescribed for fibromyalgia pain.
9 <https://www.webmd.com/fibromyalgia/guide/lyrica-for-fibromyalgia-treatment#1>.
10 (AR at p. 477). In conjunction with Plaintiff's July 2012 examination, Commet left
11 no doubt he believed Plaintiff suffered from fibromyalgia, noting that Dr. Quaempts
12 had placed her on Lyrica. (AR at p. 471).² Dr. Quaempts, an "acceptable medical
13 source" as a licensed physician³, concluded Plaintiff had fibromyalgia based on what
14 ARNP Commet reported. (AR at pp. 563-64).⁴

15 The Commissioner concedes the ALJ found there was evidence Plaintiff
16 suffered from "widespread pain," the first of the 1990 ACR criteria, but contends the
17

18 ² Commet never wavered from that assessment in his subsequent
19
20 examinations of the Plaintiff. (AR at pp. 461 and 469).

21 ³ For claims filed prior to March 27, 2017, ARNPs were not considered
22
23 "acceptable medical sources" to establish the existence of an impairment. 20
24 C.F.R. §404.1513(d)(1).

25 ⁴ As far back as September 2011, Dr. Quaempts thought it "most likely" that
26
27 Plaintiff had fibromyalgia. (AR at p. 452).
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 8**

1 third of the criteria was not met in there was no evidence of exclusion of other
2 disorders that could cause the symptoms or signs of fibromyalgia. The ALJ did not
3 cite this as a reason for concluding Plaintiff did not have medically determinable
4 fibromyalgia and in any event, the evidence reasonably indicates that Dr. Quaempts
5 referred Plaintiff to the pain clinic to confirm whether Plaintiff had fibromyalgia and
6 to rule out other reasons for Plaintiff's widespread pain. That is precisely what
7 happened.⁵

8 Plaintiff's fibromyalgia is established by medical evidence consisting of signs,
9 symptoms, and laboratory findings, not just the claimant's statement of symptoms.
10 There is not medical evidence "clearly" establishing otherwise. The ALJ erred in
11 finding Plaintiff's fibromyalgia is not a medically determinable impairment. He
12 essentially relied on his own opinion whether Plaintiff's fibromyalgia was medically
13 determinable without seeking a consultative rheumatologic examination of Plaintiff
14 or the opinion of an independent medical expert.⁶

15 Because the ALJ found Plaintiff's fibromyalgia to not be a medically
16 determinable impairment, he could not have considered its effects on Plaintiff's RFC
17 because he was only obligated to consider the effects of medically determinable
18 severe and non-severe impairments. SSR 12-2p, Paragraph VI. D., citing SSR 96-8p
19 (2012 WL3104869 at *6). Likewise, there is not medical evidence "clearly"

21 ⁵ Because the 1990 criteria were met, it is unnecessary to address whether
22 the 2010 ACR Preliminary Diagnostic Criteria, as set forth in SSR 12-2p, were
23 also met.
24

25 ⁶ None of the state agency physicians who reviewed the record offered any
26 opinion about fibromyalgia.
27
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 9**

1 establishing that Plaintiff's fibromyalgia is non-severe, that it is a "slight
2 abnormality" that does not significantly limit any basic work activity. Plaintiff's
3 treating doctor, Dr. Quaempts, clearly believed the condition significantly affected
4 Plaintiff's ability to perform basic work activity during the relevant period of time.
5 (AR at pp. 563-64). That Plaintiff may have already been suffering the effects of
6 fibromyalgia while she was working and before the alleged onset date of her closed
7 period of disability (September 9, 2010) is not medical evidence establishing that she
8 did not have severe, medically determinable fibromyalgia during her alleged closed
9 period of disability.

10 On remand, the Commissioner will consider whether Plaintiff's fibromyalgia
11 causes any exertional and non-exertional limitations beyond those already found, or
12 exacerbates any of limitations already found, which may lessen Plaintiff's physical
13 RFC.

14 **B. Mental Health Impairments**

15 In his decision dated May 11, 2018, the ALJ found Plaintiff's mental health
16 impairments were not "severe," reasoning as follows:

17 Contrary to her allegations of psychological disability, the
18 claimant's records (along with her testimony) indicate
19 that her mental health issues were ongoing for years prior
20 to her departure from employment in mid-2010. Her
21 examination findings and treatment records do not
22 document any significant worsening of her depression or
23 anxiety following her alleged onset date.

24 (AR at p. 604).

25 In his decision dated January 21, 2014, the same ALJ, based on his review of
26 much of the same evidence (e.g., November 16, 2011 consultative psychological
27 examination of Jay M. Toews, Ed. D., AR at pp. 413-16), found Plaintiff's "severe"
28 impairments included depression, post-traumatic stress disorder, and a history of
substance abuse. (AR at p. 21). The ALJ found that Plaintiff had a mild restriction

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 10**

1 concerning activities of daily living, mild difficulties in social functioning, moderate
2 difficulties with regard to concentration, persistence or pace, and had experienced one
3 to two episodes of decompensation of extended duration. (AR at pp. 22-23). He
4 noted that in May 2013, the Plaintiff attempted suicide with prescription medications
5 and was hospitalized. He determined the Plaintiff was depressed from being
6 unemployed and having marital and financial problems. (AR at p. 23). The ALJ
7 accepted the assessment of state agency physician, Jerry Gardner, Ph.D., who
8 reported on February 22, 2012, that Plaintiff's mental impairments had resulted in
9 these functional limitations, with the exception of the episode of decompensation
10 found by the ALJ. (AR at p. 23; pp. 79-80).

11 In his May 11, 2018 decision, the ALJ reversed himself, stating the Plaintiff's
12 "suicide attempt in mid-2013 appears to have been an impulsive act of anger rather
13 than an expression of severe depression." (AR at p. 606). This time around, he gave
14 "some weight" to Dr. Gardner's assessment, noting Dr. Gardner opined that Plaintiff
15 "had no limitations in her understanding, memory, or social interaction" and that
16 Plaintiff "was capable of sustaining simple work activity and could tolerate simple
17 adjustments to change." (AR at p. 609; pp. 83-84).

18 In his January 21, 2014 decision, the ALJ found that Plaintiff's mental RFC
19 included understanding, remembering and carrying out simple instructions required
20 of unskilled work; that she could make judgments on simple work-related decisions;
21 that she could respond appropriately to supervision and co-workers; that she could
22 deal with occasional changes in the work environment; and although she had no
23 difficulty dealing with the public, she could not perform in a high pressure
24 environment such as a casino. (AR at p. 24).

25 In his May 11, 2018 decision, the ALJ found Plaintiff's "reportedly
26 longstanding psychological impairments were concurrent with gainful employment
27 in semi-skilled occupations [gambling dealer and dealer manager] immediate[ly]

28
**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 11**

1 before and immediately after her alleged period of disability” and that her treatment
2 records indicated these impairments were adequately controlled with treatment started
3 just a few months before this period, despite some concurrent alcohol abuse. (AR at
4 pp. 609-10). The ALJ concluded Plaintiff had “no psychological limitations during
5 the relevant period,” but that “[e]ven if limited to unskilled work with simple
6 instructions, simple work-related decision[s], and occasional work setting changes,
7 [Plaintiff] could perform work in the national economy according to vocational expert
8 testimony.” (AR at p. 610). The ALJ noted that in November 2013, he asked the VE
9 who testified at that hearing (Ann M. Jones) whether jobs existed in the national
10 economy for an individual with Plaintiff’s age, education, work experience, and
11 residual functional capacity, “with some additional psychological limitations.” The
12 VE testified such an individual would be able to perform the requirements of
13 representative occupations such as fast food worker, cashier II, and conveyor line
14 bakery worker. (AR at p. 618).

15 The ALJ cannot have it both ways: either the Plaintiff had psychological
16 limitations during the alleged closed period of disability or she did not. There is not
17 substantial evidence in the record supporting the ALJ’s determination that Plaintiff
18 had “no psychological limitations” during the relevant period and indeed, this is
19 established by the ALJ’s reliance in his May 11, 2018 decision on the VE’s testimony
20 from the November 2013 hearing which was based on psychological limitations
21 arising from “severe” mental impairments found by the ALJ in his January 21, 2014
22 decision. The ALJ erred in finding Plaintiff did not suffer from “severe” mental
23 impairments during the alleged closed period of disability. Medical evidence does
24 not “clearly” establish otherwise.

25 26 **REMAND**

27 Social security cases are subject to the ordinary remand rule which is that when
28

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 12**

1 “the record before the agency does not support the agency action, . . . the agency has
2 not considered all the relevant factors, or . . . the reviewing court simply cannot
3 evaluate the challenged agency action on the basis of the record before it, the proper
4 course, except in rare circumstances, is to remand to the agency for additional
5 investigation or explanation.” *Treichler v. Commissioner of Social Security*
6 *Administration*, 775 F.3d 1090, 1099 (9th Cir. 2014), quoting *Fla. Power & Light Co.*
7 *v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598 (1985).

8 In “rare circumstances,” the court may reverse and remand for an immediate
9 award of benefits instead of for additional proceedings. *Id.*, citing 42 U.S.C. §405(g).
10 Three elements must be satisfied in order to justify such a remand. The first element
11 is whether the “ALJ has failed to provide legally sufficient reasons for rejecting
12 evidence, whether claimant testimony or medical opinion.” *Id.* at 1100, quoting
13 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). If the ALJ has so erred, the
14 second element is whether there are “outstanding issues that must be resolved before
15 a determination of disability can be made,” and whether further administrative
16 proceedings would be useful. *Id.* at 1101, quoting *Moisa v. Barnhart*, 367 F.3d 882,
17 887 (9th Cir. 2004). “Where there is conflicting evidence, and not all essential factual
18 issues have been resolved, a remand for an award of benefits is inappropriate.” *Id.*
19 Finally, if it is concluded that no outstanding issues remain and further proceedings
20 would not be useful, the court may find the relevant testimony credible as a matter of
21 law and then determine whether the record, taken as a whole, leaves “not the slightest
22 uncertainty as to the outcome of [the] proceedings.” *Id.*, quoting *NLRB v. Wyman-*
23 *Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969). Where all three elements are satisfied-
24 ALJ has failed to provide legally sufficient reasons for rejecting evidence, there are
25 no outstanding issues that must be resolved, and there is no question the claimant is
26 disabled- the court has discretion to depart from the ordinary remand rule and remand
27 for an immediate award of benefits. *Id.* But even when those “rare circumstances”
28

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 13**

1 exist, “[t]he decision whether to remand a case for additional evidence or simply to
2 award benefits is in [the court’s] discretion.” *Id.* at 1102, quoting *Swenson v.*
3 *Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989).

4 The ALJ erred in failing to find that Plaintiff suffered from “severe” medically-
5 determinable fibromyalgia and “severe” mental impairments during the alleged closed
6 period of disability. There are, however, outstanding issues which remain to be
7 resolved, in particular the impact of Plaintiff’s fibromyalgia upon her physical RFC.
8 And although the existence of “severe” mental impairments, by the ALJ’s own
9 rationale, precludes Plaintiff from performing her past relevant work, this court makes
10 no finding at this time whether substantial evidence supports the ALJ’s conclusion
11 that Plaintiff is capable of performing other unskilled work in the national economy.
12 The Plaintiff’s testimony, and the testimony of her lay witnesses, needs to be
13 reassessed, and the medical opinions re-evaluated in light of the fact that Plaintiff
14 suffered from “severe” medically determinable fibromyalgia and “severe” mental
15 health impairments during the alleged closed period of disability.

16 The court recognizes this matter has already been remanded once for further
17 proceedings before the same ALJ, but that was pursuant to stipulated remand which
18 did not identify any particular errors on the part of the ALJ and provided only very
19 general guidance regarding what was to occur on remand. Because there is
20 conflicting evidence regarding the extent of Plaintiff’s physical and mental limitations
21 and how they impact her ability to perform other work in the national economy, and
22 not all factual issues have been resolved, the court will order a remand for further
23 proceedings consistent with this opinion.

24 The court recommends the Commissioner assign a different ALJ to hear the
25 case on remand since the same ALJ has already reviewed the evidence twice. See
26 *Harris v. Barnhart*, 219 F.Supp.2d 966, 977 and n. 5 (E.D. Wis. 2002), citing *Rohan*
27 *v. Chater*, 98 F.3d 966, 971 (7th Cir. 1996)(recommending assignment to different
28

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 14**

1 ALJ on remand where, among other things, ALJ relied on his own unsupported
2 medical opinions about plaintiff's conditions).

3
4 **CONCLUSION**

5 Plaintiff's Motion For Summary Judgment (ECF No. 14) is **GRANTED** and
6 Defendant's Motion For Summary Judgment (ECF No. 15) is **DENIED**. Pursuant to
7 sentence four of 42 U.S.C. §405(g), the Commissioner's decision is **REVERSED** and
8 **REMANDED** for further administrative proceedings consistent with this order.

9 **IT IS SO ORDERED.** The District Executive shall enter judgment
10 accordingly, forward copies of the judgment and this order to counsel of record, and
11 **close the case.**

12 **DATED** this 11th day of March, 2019.

13
14 *s/Lonny R. Suko*

15 _____
16 LONNY R. SUKO
17 Senior United States District Judge
18
19
20
21
22
23
24
25
26
27
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 15**